81-2401

No. .....

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In the Supreme Court of the United States

OCTOBER TERM, 19____

ULRICH WALDEMAR YOUNG, a minor, NORBERT NELSON YOUNG and CHARLOTTE MARIE YOUNG, GLENN O. YOUNG, in person and Administrator of the Estate of Thomas Alexander Young, and Father and next friend of Ulrich Waldemar Young and Norbert Nelson Young,
Petitioners,

v.

FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, Dallas, Texas; JAMES M. STURDIVANT, GABLE, GOTWALS, RUBIN, FOX, JOHNSON & BAKER, as Attorneys,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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July, 1982

QUESTION PRESENTED

In affirming a Judgment of the United States District Court for the Northern District of Oklahoma, which overruled Appellants' Motion to Remand, the Tenth Circuit disregarded limitations imposed by Congress on jurisdiction of the United States District Court for the Northern District of Oklahoma.

The Judgment affirmed constituted a breach of Oklahoma Constitution and Statutes and Acts of the United States Congress vesting authority in Oklahoma courts.*

The usurpation of authority by the United States District Court for the Northern District of Oklahoma violates the rules of this Court unanimously announced in *Kelleam* v. *Maryland Casualty Company*, 312 U.S. 377-382, 85 L.Ed. 899, an opinion by the late Justice William O. Douglas.

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* See Appendices hereto.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners herein pray that a Writ of Certiorari issue to the United States Court of Appeals for the Tenth Circuit to review the judgment of said court entered in the above styled case on the 23rd day of March, 1982, and Order Denying Rehearing entered the 22nd day of April, 1982.

OPINIONS BELOW

The Slip Opinion of said court (not for official publication) is printed as Appendix "A" hereto. The Order of the District Court for the Northern District of Oklahoma is printed as Appendix "D" hereto. The Journal Entry of Judgment of the United States District Court is printed as Appendix "E" hereto. The Order of the United States Court of Appeals Denying Petition for Rehearing appears as Appendix "B" hereto.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254, which, in pertinent parts, reads:

> "§ 1254. *Courts of appeals; certiorari; appeal; certified questions*
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

STATUTES INVOLVED

The Statutes of the United States (Title 28, U.S.C.) vesting District Courts with jurisdiction, so far as pertinent, read:

> "§ 1332. *Diversity of citizenship; amount in controversy; costs*
>
> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

* * * *

(c) For the purposes of this section and section 1441 of this title [28 USCS § 1441], a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: Provided further, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business."

"§ 1441. *Actions removable generally*

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division enbracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. *Any other action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.*" (italics added)

STATEMENT OF THE CASE

Upon reaching his majority, Ulrich Waldemar Young, joined by his brother, Norbert, his mother, Charlotte, and his father, Glenn O., in person and as Administrator of the Estate of Thomas Alexander Young, on September 14, 1979, filed in the District Court of Creek County, Oklahoma as specifically authorized by the Statutes of the State,[1] an action for damages, court costs and attorney fees against Fidelity Union Life Insurance Company, James M. Sturdivant, Gable, Gotwals, Rubin, Fox, Johnson & Baker, and Glen Rinehart, as its attorneys and agent. No appearance was ever made or service attempted on Rinehart. He did not petition for removal and by reason thereof is not a party to this suit.

On October 5, 1979, Elsie Draper, appearing only for the defendants, Fidelity and its Oklahoma attorneys, filed a Petition for Removal[2] of this suit to the United States District Court for the Northern District of Oklahoma.[3] She served upon plaintiffs' attorney Notice of Removal of said action in behalf only of the same litigants. Grounds asserted for removal were alleged to be fraudulent joinder of Fidelity's Oklahoma attorneys to defeat federal jurisdiction. Since Fidelity and its attorneys and plaintiffs were all for the purpose of this suit Oklahoma citizens, whether they were fraudulently joined or not was immaterial to the case.

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[1] 12 O.S. §1031.

[2] See Appendix "F" hereto.

[3] See Appendix "G" hereto.

On November 6, 1979, plaintiffs filed their Motion to Remand alleging lack of jurisdiction in said United States District Court.[4]

On May 5, 1982, following hearing in which the question of federal jurisdiction on the ground of fraudulent joinder was, by the court, considered, the Motion to Remand was overruled. The case proceeded to trial on defendants' Motion for Summary Judgment alleging, inter alia, *res judicata.*

The case alleged to be *res judicata* was void upon the face of the record for want of diversity of citizenship. (See Petition for Removal, Appendix "G" hereto.)

On August 18, 1980, Judgment was entered for the defendants and for costs in the amount of $5,165.00. Alleged basis for this Order entered in the absence of and without Notice to Petitioners, was a "scrivener's error."[5]

On appeal, said Judgment was affirmed by the Tenth Circuit. The Judgment ignored the issues of jurisdiction assigned as Error No. 1 and, on rehearing pointing out said error, overruled said Motion without opinion.

Petitioners here allege that in both the suit asserted to be *res judicata*[6] and in the instant case, there was an absence of federal jurisdiction by reason of the fact that for the purposes of both suits, Fidelity, by an act of Congress for purposes of jurisdiction, was a citizen of Okla-

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[4] See Appendix "H" hereto.

[5] See Appendix "C" hereto.

[6] See Appendix "A", p. 5a hereto.

homa of which State all petitioners here, as well as Thomas Alexander Young, the insured under Fidelity's life insurance policy, was also a citizen.[7]

Petition for Certiorari is sought herein to require said court to observe restrictions upon federal jurisdiction imposed by the Congress of the United States,[8] and for an order to vacate, for lack of federal jurisdiction, all orders and proceedings adverse to plaintiffs and remand this proceeding to the District Court of Creek County, State of Oklahoma, in which it was filed at the cost of the removing parties.

Concerning the question of federal jurisdiction in the case originally decided by the Circuit Court of Appeals, the record will disclose that in that case, all petitioners herein, save Ulrich's mother, Charlotte, were expressly excluded from appearing either in person or by their attorney and further that in that case, federal jurisdiction was, by stipulation, conceded by Charlotte Young's attorney who at all times had not considered the statute making Fidelity an Oklahoma citizen.

The sole issue for determination by this Court on this Petition for Certiorari, is the question the Tenth Circuit refused to consider or decide, to-wit: Upon facts undisputed and apparent on the face of the record, did the United States District Court for the Northern District of Oklahoma, upon removal of a suit filed in the District Court

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[7] The Opinion erroneously refers to Kansas as the insured's residence.

[8] See Statutes Involved, pages 2-3 of this Petition. Also cited in Opinion of Court of Appeals (Appendix).

of Creek County, Oklahoma by parties not *served*, acquire jurisdiction under the Constitution and laws of the United States, and if no such jurisdiction existed, was it error on the part of the United States Court of Appeals for the Tenth Circuit to refuse consideration of said issue and for want of federal jurisdiction reverse proceedings in the court below with directions to sustain plaintiffs' Motion to Remand?

Pertinent decisions which sustain certiorari include the following:

"Where on looking at record, United States Supreme Court can find no evidence of jurisdiction of Circuit (now District) court, it will reverse decree." *Johnson* v. *Christian*, 125 U.S. 642, 8 S.Ct. 989, 31 L.Ed. 820. (1888).

"In case of defective averment as to citizenship, judgment will be reversed by United States Supreme Court upon its own motion, and case remanded." *Denny* v. *Pironi*, 141 U.S. 121, 11 S.Ct. 966, 35 L.Ed. 657 (1891).

"Although parties do not question federal jurisdiction under 28 USCS, 1332, Court of Appeals must consider matter sue sponte." *Caffery* v. *New York Central Railroad Co.*, 324 F.2d 711 (2d Cir. 1963).

"General appearance in proceeding removed to federal court did not confer jurisdiction of cause not within original jurisdiction." *Mullendore* v. *American Surety Co.*, 27 F.2d 572 (9th Cir. 1928), *cert. den.* 278 U.S. 653, 49 S.Ct. 178, 73 L.Ed. 563.

"Potential absence of diversity is jurisdictional, and must be considered on motion of either party or on court's own motion." *Sessions* v. *Chrysler Corp*, 517 F.2d 759 (9th Cir. 1975).

"Citizenship for purpose of jurisdiction cannot be waived." *Jabubowski* v. *Central Railroad Co.*, 88 F. Supp. 258 (D.C. N.Y. 1950).

"Defendant's failure to raise issue of diversity jurisdiction before final judgment does not amount to waiver, since court may dismiss case for lack of jurisdiction at any stage of proceeding." *Basso* v. *Utah Power & Light Co.*, 495 F.2d 906 (10th Cir. 1974).

Kelleam v. *Maryland Casualty Company*, 312 U.S. 377-382, 85 L.Ed. 899.

That certiorari is warranted is further established from a brief summary of the issues before both the trial and the Circuit Courts as disclosed by the official reports. This controversy involves a question of the liability of Fidelity Union Life Insurance Company under a policy of insurance applied for by Thomas Alexander Young on the 16th day of September, 1974, from which the following is quoted:

"I agree that there shall be no liability hereunder until a policy shall be issued and manually delivered while the state of health of the Proposed Insured is as stated in this application and the first premium actually paid."

The Application contained a further proviso that:

"If the full first premium is paid at the time of this application and in exchange for the Conditional Receipt bearing the same number as this application and if on that date the Proposed Insured was, in the opinion of the Company's authorized officers at its Home Office, insurable and acceptable under the company's rules and practices for the policy, in the amount, on the plan, and otherwise exactly as applied for, then the insurance shall be effective from this date or the

date of the last of any medical examinations or questionnaires required by the Company, if later, subject to the terms of the policy applied for and of the Conditional Receipt."

The policy issued was dated September 18, 1974. The premium demanded by Fidelity differed from that specified in the application. No conditional receipt was appended to the policy when issued or to the application appended thereto. The policy, with the application appended, contained the following:

"The Contract. This policy, together with the application herefor, a copy of which is attached when issued, constitute the entire contract. All statements made by or in behalf of the Insured shall, in the absence of fraud, be deemed representations and not warranties. No statement will void this policy or be used in defense of a claim under it unless contained in the written application and endorsed upon or attached to the policy when issued."

There is a dispute as to the number and amount of premiums paid, but admitted that the monthly premium requested by the writing agent was paid at the delivery of the application. Further, that the applicant's mother, at his request, paid a second monthly premium to the writing agent which was forwarded to and received by the company.

The company, in transmitting the policy for delivery, directed the writing agent to collect an additional 0.01¢ as the first monthly premium.

The policy was delivered December 22, 1974; the insured died from gunshot in line of duty while on active service with the United States Air Force February 14, 1975.

The policy made Young's mother and father principal beneficiaries, his minor brothers contingent beneficiaries.

The beneficiaries assert that the policy was effective as of December 22, 1974; that the company assumed no liability prior to that date; that the two monthly premiums, admittedly paid, obligated Fidelity from December 22, 1974 to February 22, 1975. Ergo: that when rendered February 14, 1975, the policy was in full force and effect.

Fidelity, through its Oklahoma attorneys, asserted falsely that the policy was in effect from September 16, 1974; hence had lapsed at the date of the insured's death.

For filing suit and asserting the policy was in effect and payable, Petitioners were assessed attorney's fees as costs in the sum of $5,165.00 under a procedural statute of the State of Oklahoma not in effect when a case asserted to have decided the issues herein was tried.

Petitioners, to the plea of *res judicata*, responded that all except the mother, Charlotte, had been expressly denied permission to become parties in that case; hence, were not bound by the Judgment therein nor for costs including attorneys' fees.

It's Petitioners' contention that Fidelity and its attorneys perpetrated a fraud, inter alia, in asserting that its policy became effective September 16, 1974, i.e., two days before Airman Young's application was *approved* and the policy dated September 18, 1974 issued, delivered or accepted.

If, when delivered and accepted, the policy had lapsed, it was of no value. Representations to the contrary through

the United States Mails constituted a federal offense. Collection and retention of premiums to January 4, 1975, established by the evidence on hearing Motion to Remand, vested rights in the Administrator of the Estate supporting his claim as a real party in interest, but in no wise obligating him to pay attorneys' fees.

REASONS FOR GRANTING THE WRIT

From the foregoing statement which includes the circumstances established and relevant in the course of the hearing on Motion to Remand, it is respectfully submitted that by reason of lack of federal jurisdiction at any time, it was error for the District Court to overrule and deny Motion to Remand and for the United States Circuit Court of Appeals for the Tenth Circuit to affirm judgments and orders issued without jurisdiction.

CONCLUSION

Petitioners submit that in the circumstances outlined above, they have no remedy save such as available to them by Writ of Certiorari issued by this Honorable Court.

Respectfully submitted,

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July, 1982